

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANDRE SMITH, SR.,

Plaintiff,

**PHYSICIANS MUTUAL INSURANCE
CO., et al.,**

Defendants.

3:21-cv-00243-MMD-CLB

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹**

Before the court is Plaintiff Andre Smith's ("Plaintiff"), application to proceed *in forma pauperis* (ECF No. 1) and his *pro se* civil rights complaint (ECF No. 1-1). For the reasons stated below, the court recommends that Plaintiff's *in forma pauperis* application (ECF No. 1) be granted, and his complaint (ECF No. 1-1) be dismissed, with prejudice.

I. IN FORMA PAUPERIS APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

2 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some
 3 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
 4 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy
 5 the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339
 6 (1948).

7 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
 8 therefore, the court recommends that the application (ECF No. 1) be granted.

9 **II. SCREENING STANDARD**

10 Prior to ordering service on any defendant, the court is required to screen an *in forma*
 11 *pauperis* complaint to determine whether dismissal is appropriate under certain
 12 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28
 13 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for
 14 the enumerated reasons). Such screening is required before a litigation proceeding *in forma*
 15 *pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507 (9th Cir.
 16 2015).

17 "[T]he court shall dismiss the case at any time if the court determines that – (A) the
 18 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious; (ii)
 19 fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against
 20 a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

21 Dismissal of a complaint for failure to state a claim upon which relief may be granted
 22 is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
 23 tracks that language. When reviewing the adequacy of a complaint under this statute, the
 24 court applies the same standard as is applied under Rule 12(b)(6). See, e.g., *Watson v.*
 25 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a
 26 plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii)
 27 is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a

1 claim."). Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel*
 2 *v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

3 The court must accept as true the allegations, construe the pleadings in the light most
 4 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
 5 395 U.S. 411, 421 (1969) (citations omitted). Allegations in *pro se* complaints are "held to
 6 less stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449
 7 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

8 A complaint must contain more than a "formulaic recitation of the elements of a cause
 9 of actions," it must contain factual allegations sufficient to "raise a right to relief above the
 10 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
 11 must contain something more. . . than. . . a statement of facts that merely creates a suspicion
 12 [of] a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a
 13 minimum, a plaintiff should include "enough facts to state a claim to relief that is plausible
 14 on its face." *Id.* at 570; see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

15 A dismissal should not be without leave to amend unless it is clear from the face of
 16 the complaint the action is frivolous and could not be amended to state a federal claim, or
 17 the district court lacks subject matter jurisdiction over the action. See *Cato v. United States*,
 18 70 F.3d 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

19 III. SCREENING OF COMPLAINT

20 In his complaint, Plaintiff sues Defendants Physicians Mutual Insurance Co., Nike
 21 Shoe Company, and State of Nevada (collectively referred to as "Defendants") for
 22 unspecified relief. (See ECF No. 1-1.) Plaintiff's complaint states "no contract from Nike
 23 Shoe Co. or patent school in Washington D.C.". (*Id.* at 4.)

24 Plaintiff's complaint is rambling, nonsensical, and filled with incomplete sentences.
 25 Dismissal on those grounds alone is appropriate. Federal Rule of Civil Procedure 8(a)(2)
 26 requires that a complaint contain "a short and plain statement of the claim showing that the
 27 pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is

1 and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quotation and alteration
 2 omitted). It must also include "a demand for the relief sought. . . ." Fed. R. Civ. P. 8(a)(3).
 3 Here, Plaintiff's largely incomprehensible narrative makes it nearly impossible for the court
 4 to identify the factual or legal basis for his claims or the nature of his requested relief. Plaintiff
 5 states no claim upon which relief may be granted, and given the vague nature of the
 6 allegations, amendment would be futile. See *Cato*, 70 F.3d at 1106.

7 Next, the court recommends dismissal of the State of Nevada, with prejudice, as
 8 amendment would be futile. Plaintiff cannot raise 42 U.S.C. § 1983 claims against the State
 9 of Nevada based on Eleventh Amendment sovereign immunity. See *Brooks v. Sulphur*
 10 *Springs Valley Elec. Co-op.*, 951 F.2d 1050, 1053 (9th Cir. 1991) (holding that "[t]he
 11 Eleventh Amendment prohibits federal courts from hearing suits brought against an
 12 unconsenting state" and that "[t]he Eleventh Amendment's jurisdictional bar covers suits
 13 naming state agencies and departments as defendants, and applies whether the relief
 14 sought is legal or equitable in nature"); see also *Will v. Michigan Dep't of State Police*, 491
 15 U.S. 58, 65 (1989) (holding that states are not persons for purposes of § 1983); see NRS §
 16 41.031(3) (stating that the State of Nevada does not waive its Eleventh Amendment
 17 immunity).

18 Additionally, 42 U.S.C. § 1983 aims "to deter state actors from using the badge of
 19 their authority to deprive individuals of their federally guaranteed rights." *Anderson v.*
 20 *Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135,
 21 1139 (9th Cir. 2000)). The statute "provides a federal cause of action against any person
 22 who, acting under color of state law, deprives another of his federal rights[,"] *Conn v.*
 23 *Gabbert*, 526 U.S. 286, 290 (1999), and is "merely . . . the procedural device for enforcing
 24 substantive provisions of the Constitution and federal statutes." *Crumpton v. Gates*, 947
 25 F.2d 1418, 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the
 26 violation of a federally-protected right by (2) a person or official who acts under the color of
 27 state law. *Anderson*, 451 F.3d at 1067.

1 A defendant has acted under color of state law where he or she has “exercised power
 2 ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed
 3 with the authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *U.S. v.*
 4 *Classic*, 313 U.S. 299, 326 (1941)). Generally, private parties are not acting under color of
 5 state law. See *Price v. Hawaii*, 939 F.2d 702, 707–08 (9th Cir. 1991). “A private individual
 6 may be liable under § 1983 if she conspired or entered joint action with a state actor.”
 7 *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). The plaintiff must show “an agreement
 8 or meeting of the minds to violate constitutional rights,” and “[t]o be liable, each participant
 9 in the conspiracy need not know the exact details of the plan, but each participant must at
 10 least share the common objective of the conspiracy.” *Id.* (internal quotation marks omitted).

11 Plaintiff’s two remaining named defendants, Physicians Mutual Insurance Co. and
 12 Nike Shoe Company, are private parties. Plaintiff does not allege that these Defendants
 13 were acting under the color of state law when his rights were violated or that these
 14 Defendants conspired or entered joint action with a state actor. Because Plaintiff is suing
 15 private parties and does not assert that they acted under the color of state law, he cannot
 16 satisfy each of the required elements for relief under an § 1983 action.

17 Finally, it appears Plaintiff has filed similar lawsuits in the past. See *Smith-Lovejoy v.*
 18 *Physicians Mutual Insurance*, Case No. 3:12-CV-00011-ECF-VPC; *Smith-Lovejoy v. State*
 19 *of Nevada*, Case No. 3:17-CV-00272-MMD-VPC; *Smith-Lovejoy v. State of Nevada*, Case
 20 No. 3:17-CV-00665-RCJ-VPC. The court notes that duplicative litigation by a plaintiff
 21 proceeding *in forma pauperis* may be dismissed as malicious under 28 U.S.C. § 1915(e).
 22 See *Cato*, 70 F.3d at 1105 n.2 (citing *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988)
 23 (holding that repetitious litigation of virtually identical causes of action is subject to dismissal
 24 as malicious)); *Pittman v. Moore*, 980 F.2d 994, 994-95 (5th Cir. 1993) (holding that it is
 25 malicious for a “pauper” to file a lawsuit that duplicates allegations of another pending federal
 26 lawsuit by the same plaintiff). Accordingly, the court recommends the complaint be
 27 dismissed, with prejudice, as the complaint fails to state a claim and is malicious.

1 **IV. CONCLUSION**

2 For the reasons articulated above, the court recommends that Plaintiff's application
3 to proceed *in forma pauperis* (ECF No. 1) be granted, and his complaint (ECF No. 1-1) be
4 dismissed, with prejudice, as amendment would be futile.

5 The parties are advised:

6 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
7 Practice, the parties may file specific written objections to this Report and Recommendation
8 within fourteen days of receipt. These objections should be entitled "Objections to Magistrate
9 Judge's Report and Recommendation" and should be accompanied by points and
10 authorities for consideration by the District Court.

11 2. This Report and Recommendation is not an appealable order and any notice
12 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
13 Court's judgment.

14 **V. RECOMMENDATION**

15 **IT IS THEREFORE RECOMMENDED** that Plaintiff's application to proceed *in forma*
16 *pauperis* (ECF No. 1) be **GRANTED**;

17 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint (ECF No. 1-1);

18 **IT IS FURTHER RECOMMENDED** that Plaintiff's complaint (ECF No. 1-1) be
19 **DISMISSED, WITH PREJUDICE**; and,

20 **IT IS FURTHER RECOMMENDED** that this action be **CLOSED** and that judgment
21 be entered accordingly.

22 **DATED:** June 17, 2021.



23 **UNITED STATES MAGISTRATE JUDGE**

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